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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUAN DEL VALLE, JR., Defendant and Appellant.	G033866 (Super. Ct. No. 02NF3910) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James P. Marion, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Holley A. Hoffman and Kristin Anton, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Juan Del Valle, Jr. of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[1] and found true an allegation he inflicted great bodily injury (§ 12022.7, subd. (a)).[2] Defendant contends he was deprived of a fair trial because of prosecutorial misconduct during closing argument. We disagree and affirm the judgment.

FACTS

Defendant worked as a sales representative for a company called Worldwide Circulation. The company's sales representatives traveled around the country in groups of 50 to 60 making door-to-door sales of magazine subscriptions. Robert Richie was a manager of the sales crew and defendant's supervisor.

On December 10, 2002, members of the crew, including defendant's girlfriend, Angie Landa, and Richie's girlfriend, Melissa Smith, were staying at a hotel in Buena Park. That evening, Richie played cards with a group of friends. Apparently successful, Richie left the card game and went to his room to stash the money he had won. When he arrived at the room he shared with Smith, Smith told him defendant had come to their room, and told her Richie was off "having sex with Angie [Landa] and since [Richie was] off doing that then [defendant] should be doing the same thing with her."

In Richie's words, he "got pissed off and . . . went out there and confronted [defendant]." Defendant was with Jeff Villegas when Richie arrived, and Villegas was

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] Defendant was acquitted on a charge of attempted murder and the lesser included offense of attempted voluntary manslaughter.

engaged in an argument with a group of six other people. During the course of that argument, Jeff had handed a knife to defendant and had told him "get my back if anything goes on." Ignoring the on-going argument, Richie confronted defendant, and asked him "why do you have to talk shit." An argument ensued between Richie and defendant, followed by a fistfight. Richie testified defendant threw the first punch. Defendant testified Richie threw the first punch.

Richie thought defendant was "punching me real light in the stomach." But when he looked down, he saw a knife in defendant's hand, and then experienced difficulty breathing. Richie put his hands down, and they became covered with blood. He also saw blood, "lots of it," on his torso. Richie, still having difficulty breathing, stumbled around, banging on doors looking for help. Richie lost consciousness, and awoke with a friend applying towels in an effort to stop the bleeding. Heather Gaddy, one of the other sales representatives, saw the fight, saw defendant walk away with a knife in his hand, and saw Richie walk away "crumpled over." She testified Richie was "bleeding pretty heavy," "his whole shirt was covered [with blood]," and "he started going into convulsions and losing consciousness."

As defendant walked away from the fight, Villegas said, "You stabbed him. I think you stabbed him." Defendant became frightened and began running. As they ran, defendant handed the knife to Jeff and Jeff dropped it into a storm drain. A short time later, the police arrested defendant after finding him hiding with Villegas in a restroom in a nearby park.

Richie was taken to the hospital where he underwent abdominal surgery to repair some of his wounds. In all, Richie suffered nine stab wounds. The knife had pierced the abdominal wall several times and had bruised a lung.

DISCUSSION

Defendant contends the prosecutor committed prejudicial misconduct during closing argument by referring to matters outside the record or contrary to the evidence, misstating testimony and misrepresenting the law, and improperly appealing to the sympathy of the jury by asking "how would you like to have a knife enter your body." He specifies seven incidents during the prosecutor's argument that he asserts constitute misconduct requiring reversal, whether considered individually or cumulatively. We disagree.

Prosecutorial misconduct involves the use of "'deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (*People v. Haskett* (1982) 30 Cal.3d 841, 866.) And, of course, it is misconduct for a prosecutor to mischaracterize the evidence (*People v. Hill* (1998) 17 Cal.4th 800, 823), misstate the law (*People v. Bell* (1989) 49 Cal.3d 502, 538), or appeal to the passion and sympathies of the jurors by asking them to place themselves in the position of the victim (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250). But a reversal requires more. "'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.)

We review separately each of defendant's claims of prosecutorial misconduct. On all but one, we conclude there was no misconduct. Where we do see misconduct, we conclude it was harmless.

Attack on Credibility of Defense Witness Jason Benfield

Defendant claimed self-defense, asserting Richie knocked him to the ground and started coming after him. According to defendant, he used the knife because he feared Richie would administer a severe beating. Aside from the combatants, three eyewitnesses testified about their observations of the fight. Two eyewitnesses testified defendant was never knocked to the ground. A defense eyewitness, Jason Benfield, testified defendant was knocked to the ground, and "Bob was on him . . . beating him up."

Benfield had been impeached with two theft-related convictions in North Carolina. One of his convictions had been for "writing bad checks." The prosecutor had asked Benfield, "Were you writing bad checks or were you forging checks?" Benfield answered, "They were mine. They were my checks."

During closing argument, the prosecutor characterized Benfield as a "convicted felon, a convicted thief. Two felony convictions for theft crimes." The prosecutor continued: "Ladies and gentlemen, and one of them he said was for writing bad checks. And when I asked him if they were other people's checks he said, 'they were my checks.' *I didn't know that you can get a felony for writing bad checks on your own account*." (Italics added.) Defense counsel objected, and the court immediately corrected the prosecutor, in front of the jury, stating: "You can get a felony that way, but it's argument ladies and gentlemen, okay."

Incredibly, defendant claims this incident constitutes prejudicial prosecutorial misconduct. Apparently, the prosecutor had forgotten that willful passing of one's own check with intent to defraud, and with knowledge that sufficient funds are not on hand, is a crime. (See § 476a.) But how the prosecutor's forgetfulness in this regard could cause any prejudice to defendant completely escapes us. If anything, the prosecution suffered a blow, because the court immediately told the jury the prosecutor's

statement was wrong. The prosecutor may have looked foolish, and his own credibility may have been somewhat damaged, but we perceive no prejudice to the defendant.

Melissa Smith's Text Messages to Richie

In support of his self-defense theory, defendant presented witnesses who testified about prior incidents in which Richie had exhibited aggressive, violent behavior. (See Evid. Code, § 1103.) One of those witnesses was Richie's now former girlfriend, Melissa Smith. Apparently attempting to portray Smith as a jilted lover anxious to testify about Richie's bad character, the prosecutor asked her on cross-examination whether she had responded to a phone message from Richie about two months after they broke up. Smith acknowledged sending Richie a text message telling him to leave her alone, but denied sending any text message telling him she wanted him back in her life.

On rebuttal, the prosecutor recalled Richie as a witness. He testified he still had Smith's text messages stored in his cell phone. According to Richie, he received two text messages from Smith on April 6, 2003, which stated "she loves me and she's sorry she messed up the best thing she ever had, and please call her ASAP." Despite this testimony, defendant argues on appeal the prosecutor committed misconduct during closing argument because "those messages were never introduced as evidence." But as just recited, the messages *were* received as evidence. *Richie testified to their content*. Defendant has completely mischaracterized and twisted what really happened.

What *really* happened during the defendant's recross examination of Richie's rebuttal testimony was the following exchange. "Q. By [defense counsel]: And Melissa Smith left you text messages that you were the best thing she ever had? [¶] A. That's correct. [¶] Would you like to see them? [¶] Q. I'm going to object to that as nonresponsive ask this [*sic*] it be stricken? [¶] The court: That's sustained. [¶] And Mr. Richie just answer the questions, okay. [¶] The witness: Okay. [¶] The court: We don't

want to see how well you can manipulate a phone, all right. [¶] The witness: Okay. Sorry. [¶] The court: It's all right." Thus, it is clear the court struck the nonresponsive part of Richie's answer, not that part of his answer confirming the content of the text messages.

And what *really* happened during the prosecutor's closing argument was as follows. When commenting on Smith's testimony, the prosecutor argued: "When I asked her if the text messages were, I want you back, Bob. You're the best thing that ever happened to me? She denied that. [¶] Well, Bob told you yesterday he's got the messages in his phone. He had the date. Do you recall yesterday when I asked him the date. Two messages from her on April 6th, 2003. He asked, do you want to see them? [¶] [Defense counsel]: Objection; That was. [¶] The court: I think that was stricken — [¶] [Defense counsel]: That was stricken. [¶] The court: — Mr. [prosecutor]. [¶] [Prosecutor]: Apologize, your honor."

It is clear. The court struck Richie's offer to show the messages on his cell phone. His testimony concerning the content of the messages was never stricken. During argument, defense counsel made an appropriate objection to the portion of Richie's answer that had been stricken as nonresponsive. The court immediately agreed it had been stricken, and the prosecutor apologized. But defendant's assertion that the content of the messages was not in evidence is incorrect. And the suggestion that this innocuous exchange amounts to a deceptive or reprehensible method of misleading the jury is wholly without merit.

There Was a Great Deal of Evidence That Richie Was "Losing a Tremendous Amount of Blood"

Defendant's next argument makes us wonder whether we have read the same trial transcript. He argues it was misconduct for the prosecutor to state Richie was

"losing a tremendous amount of blood," because there was "no evidence to that effect." What?

First, in context, the prosecutor was explaining the jury instruction dealing with the charge of attempted murder. He told the jury, "What I need to prove to you to find the defendant guilty of this one, 'that a direct, but ineffectual act was done by the defendant towards the killing of another human being.'" The prosecutor continued, "The ineffectual act by the defendant toward killing Bob, well, he clearly stabbed him nine times. Why was it ineffectual because the paramedics got there pretty quick and took him in the hospital, but he was losing a tremendous amount of blood as the — [¶] [Defense counsel]: Objection; there's no evidence to that. [¶] The court: Well, I think, again, it's debatable point. I'll leave it up to the jury."

The objection during the argument was ridiculous. The argument on appeal is even more so. Richie testified when he looked down at his torso, he saw "[b]lood. Lots of it."

One eyewitness testified Richie "was bleeding pretty heavy," and, referring to the bleeding, said, "[H]is whole shirt was covered. I mean, then other people came in to help him and I pretty much saw his shirt covered up. He started going into convulsions and losing consciousness." When this eyewitness was asked directly whether she saw "a lot of blood," she testified, "Yeah. His whole shirt was covered."

Another eyewitness was asked what Richie looked like when he "buckled down to his knees." He answered: "Bob's shirt was just — it was — it was grayish, soaked silk shirt, totally crimson, maroon, various slits in it. It was just like plastered. It was like plastered to him, soaked. It was just — it was pretty vivid." The prosecutor followed up: "Soaked with what?" The witness answered: "Blood."

The first police officer that responded to the scene testified Richie was lying on the ground when he arrived with a blanket over him. "When I lifted up the

blanket, I saw a good amount of blood on his clothes, his pants and shirt." The officer continued describing Richie's condition. "He was pale and he was getting — he was pale and getting paler as time went on."

Finally, the trauma surgeon who treated Richie testified that loss of a large amount of blood could cause loss of consciousness and convulsions. Both conditions were observed at the scene.

The prosecutor's characterization of this evidence as the loss of a "tremendous amount of blood" does not remotely resemble prosecutorial misconduct. We wonder how better such evidence could have been described.

The Prosecutor Did Not Falsely Represent a Stipulation

Defendant asserts prosecutorial misconduct for misrepresenting a stipulation entered into during trial. Specifically, defendant asserts "the prosecutor falsely stated that appellant stipulated that Ritchie [*sic*] had never been convicted or gone to prison." Once again, the record of the prosecutor's argument does *not* support defendant's argument.

As part of defendant's effort to portray Richie as a violent, aggressive person, defendant and his girlfriend, Angie Landa, both testified that Richie had told them he had been arrested "for shooting [several] black guys" in Philadelphia. In Landa's version, Richie claimed to have shot "three black guys." In defendant's version, Richie claimed to have shot "four black guys."

When Landa first testified about Richie having stated he shot "three black guys," the court intervened to explain the hearsay rule, and to advise the jury the statement was not being admitted to establish its truth, but only for the effect, if any, it had on the defendant at the time of the fight. As part of that explanation, the parties chose to read into the record a stipulation they had made on the subject. The stipulation

was explained to the jury as follows. "[Defense counsel]: I believe the stipulation between the parties is that the district attorney's office has utilized its resources in checking out whether or not that, in fact, occurred and they have found no record of it. [¶] The court: No record that Mr. Richie stabbed three black people? [¶] [Defense counsel]: Shot three black people in Philadelphia. [¶] The court: Or anything about doing any kind of shooting of any other people, right? [¶] [Prosecutor]: That's stipulated by the defense too, correct? [¶] The court: Right. Both sides stipulated. Okay, that's a fact. Okay." On rebuttal, Richie testified he never "shot three or even four guys in [his] lifetime," he had never been to prison, and he had never bragged to defendant or to Landa that he had "shot three guys."

With this background, we return to that portion of the prosecutor's closing argument now contended to constitute misconduct. "[Prosecutor]: [Defense counsel] asked [Richie] yesterday about his record. He said he's never been convicted. She just told you, she recalled incorrectly, that he said it was quashed. Yesterday, ladies and gentlemen, he told he [*sic*] does not have anything [*sic*] convictions. He's never been to prison. They stipulated to the fact — [¶] [Defense counsel]: I'm going to object as *misstates the testimony yesterday*. [¶] [The court]: All right. Why don't did [*sic*] you onto a different point." (Italics added.)

On appeal, defendant asserts the prosecutor falsely represented the stipulation — that the parties had stipulated Richie had no criminal record — not simply that the district attorney had found no record of the Philadelphia shooting story. But that is clearly *not* what happened. The objection made during the argument had to do with *yesterday's testimony,* it had nothing to do with the stipulation. In fact, in *yesterday's testimony*, Richie acknowledged he had once hit a person who was calling his friend a "nigger." Then defense counsel asked him whether that incident was the subject of a conviction. Richie answered: "No, I['ve] never been convicted on anything, ma'am."

Defense counsel asked the question again, directing his attention to the specific incident he had acknowledged, and Richie said, "I think everything has been dropped."

The prosecutor wove a recitation of the above exchange into his argument, and was then *about to describe the stipulation,* when defense counsel challenged the accuracy of the previous day's testimony. *The prosecutor never did state what the stipulation was*. The content of the stipulation not having been argued, it could not have been misrepresented. There was no prosecutorial misconduct.

The Prosecutor Did Not Misrepresent the Law Regarding Voluntary Intoxication

There was evidence during the trial that defendant had been drinking before his encounter with Richie. Defendant contends the prosecutor told the jurors that if they found defendant was intoxicated, they would still be required to find him guilty of a "lesser offense." Since the jury was instructed on both attempted voluntary manslaughter and attempted murder, defendant argues voluntary intoxication would negate the element of specific intent required for each crime, thereby making the prosecutor's argument a misrepresentation of law.

But once again, defendant's description of the prosecutor's argument is not what *really* happened. Defendant was charged in count 1 with attempted murder, which includes the lesser offense of attempted voluntary manslaughter, both of which are specific intent crimes. Defendant was also charged in count 2 with assault with a deadly weapon, a general intent crime. The jurors had already been instructed with CALJIC No. 4.21.1, specifically telling them a finding of voluntary intoxication could be considered in determining whether defendant had the requisite specific intent to be convicted of attempted murder or its lesser offense of attempted voluntary manslaughter. But CALJIC No. 4.21.1 also told the jurors voluntary intoxication is not a defense to the crime of assault with a deadly weapon or the allegation of great bodily injury. During argument,

the prosecutor was debunking the claim of intoxication, and while doing so began to explain the mental state required for attempted murder, attempted voluntary manslaughter, and assault with a deadly weapon, and how voluntary intoxication would relate to those crimes. The prosecutor's argument, and defendant's objection, went as follows.

"[Prosecutor:] Another excuse. I was drunk. Yet he's not drunk enough to walk away from this incident, is he? And then to begin running. And to run and be found at a park, as Officer Young told you, a good mile, mile and a half away. [¶] . . . Oh, and guess what, he's not drunk enough to forget to discard the knife, the weapon in this crime. Thrown down a drain. [¶] . . . He wasn't drunk enough to do that, to get away. He didn't get hit by any cars on Beach Boulevard as he was leaving. Didn't cross the streets obviously. Sure wasn't drunk enough to do that, was he? [¶] But only when it helps him, only when he wants you — *they want you to think that he didn't have this intent so that you would have to find the lesser that's when he's drunk*. That's when he's drunk. Don't buy that. Don't buy that. He knew what he was doing. [¶] [Defense counsel]: I'm going to object to that statement as misstating the law. That voluntary intoxication can only not [*sic*] used to reduce count 1 to a lesser. It applies — [¶] The court: Go ahead. [¶] [Defense counsel]: It applies to specific intent overall. [¶] The court: Right. [¶] Well, ladies and gentlemen, you got a lot of instructions. And there's some leeway here. I know the defense is going to get up and argue the law to you. I told you what the law applies, it's a little bit technical here, go ahead, Mr. [prosecutor]." (Italics added.)

The prosecutor *immediately* corrected any misimpression he may have created by explaining voluntary intoxication was not a defense to assault with a deadly weapon, stating: "In regards to the count 2, assault with a deadly weapon, ladies and gentlemen, this is a general intent crime. Not a specific intent. You want me to give you

the low down on it is that you cannot say you're too drunk to commit that crime. Voluntary intoxication is not a defense to that. He's clearly guilty of the assault with a deadly weapon."

And, of course, the jury *acquitted* defendant of the two specific intent crimes, and found him guilty *only* of the assault with a deadly weapon. Even if the jury had misunderstood the prosecutor's argument as not allowing voluntary intoxication to be considered in connection with the specific intent required for attempted voluntary manslaughter, the misunderstanding was not prejudicial since defendant was acquitted of that crime. And, in context, there simply was no prosecutorial misconduct.

The Contention Regarding Use of a Knife During a Fistfight

The prosecutor concluded his argument by saying: "So ladies and gentlemen, I'm asking you to go back and find the defendant guilty of the attempted murder and guilty of the assault with a deadly weapon. Because no self-defense has been shown here. And there's that instruction, like I told you, *in a fist fight you can't bring a knife*. So he's guilty of the 245. [¶] [Defense counsel]: Objection; misstates the law. [¶] The court: Well, there's no instruction like that. At a fist fight you can't bring a knife. I didn't give that instruction." (Italics added.) The prosecutor clarified what he meant to say by reading a portion of CALJIC No. 5.31, which the court had earlier read to the jury. "This is the instruction I'm referring to, ladies and gentlemen, assault with a fist does not justify the person being assaulted in using a deadly weapon in self-defense."

Having placed the earlier statement in context of an instruction which the court had already given in its entirety, we do not believe the prosecutor's somewhat inaccurate recitation of the instruction constituted misconduct.

Appeal to Sympathy and Passion

Defendant's final assertion of prosecutorial misconduct has merit, and perhaps saves defendant's appeal from being objectively frivolous. But the misstep was harmless.

The prosecutor argued: "When you stab someone right here [referring to high on the body] numerous times, you're intending to kill them. Think about it. *How would you like to have a knife enter your body*." (Italics added.) Defense counsel immediately objected to the improper argument. The court rebuked the prosecutor saying, "Mr. [prosecutor], don't ask the jury how we would feel. Stick to the evidence, okay."

In *People v. Simington* (1993) 19 Cal.App.4th 1374, a case bearing a striking similarity to the instant case, the prosecutor asked the jury to place themselves in the position of the victim. The court reiterated the familiar rule that such an argument is improper. (*Id.* at p. 1378; *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1250.) The *Simington* court held the error harmless, noting it was not reasonably probable a different result would have obtained in the absence of the remark. The defendant in *Simington*, just like the defendant here, was acquitted of the more serious charges of attempted murder and attempted voluntary manslaughter. In a conclusion we adopt as our own in this case, the *Simington* court said: "In short, had the appeal to passion and prejudice been effective, one would have expected the jury to find appellant guilty of attempted murder or, at a minimum, attempted voluntary manslaughter. Instead, the jury acquitted appellant of these crimes." (*People v. Simington, supra,* 19 Cal.App.4th at p. 1379.) And in *Simington*, as here, evidence supporting the crime of assault with a deadly weapon, with a great bodily injury enhancement, was overwhelming. Defendant did not deny stabbing Richie. Nine stab wounds speak loudly in support of the conviction. Defendant (and Richie) is indeed fortunate we are not reviewing a homicide conviction.

No Cumulative Prejudice

Since we have concluded only one of defendant's claims of misconduct has merit, and that single incident was harmless, we likewise conclude the cumulative effect of the claimed misconduct was also harmless.

DISCUSSION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

SILLS, P.J.

FYBEL, J.